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No. 91-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

The Opposition Briefs of the Respondents[1] confirm two essential points favoring review of this case. The Municipalities acknowledge that they have imposed special restraints on advertising by real estate brokers in order to influence residents' race-based housing choices. The South Suburban Housing Center ("SSHC") concedes that "thousands" of other communities and governments may look to this case for guidance in discerning government's proper role, if any, in maintaining racial balance in the housing market. These concessions, coupled with Respondents' failure to rebut Petitioners' other arguments, establish that this Petition presents substantial and urgent questions that test the applicability of this Court's free speech and affirmative action principles to housing markets, and will shape the future of race relations throughout the nation's residential areas.

I. THE ANTI-SOLICITATION ORDINANCES VIOLATE PETITIONERS' FIRST AMENDMENT, EQUAL PROTECTION AND DUE PROCESS RIGHTS.

A. The Municipalities' Brief Confirms That They Enacted The Ordinances To Further Their Integration Maintenance Policies.

After spending four pages (Munic. Br. at 1-5) denying that race explains their decision to single out real estate advertising for special suppression—and lambasting Petitioners for suggesting otherwise—the Municipalities promptly reverse themselves and effectively admit Petitioners are correct. The Municipalities contend that suppression of real estate advertising is "particularly appropriate"

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[1] Petitioners cite the Petition as "Pet.," the Municipalities' Brief as "Munic. Br.," the Housing Center's Brief as "SSHC Br.," the Appendix to the Petition as "App.," and the Appendix to the Municipalities' Brief as "Munic. App." We cite the trial transcripts as "Tr." and Petitioners' trial exhibits as "DX."

because, although Petitioners' speech "concerns lawful activity and is not misleading" (App., p. 39), it vaguely reminds some residents of different practices conducted by different brokers in a different city several decades ago. (Munic. Br., pp. 5-6, 21.) Consequently, these residents "perceive" real estate advertising as "destabilizing to an integrated community." (*Id.*, p. 6; App. 114.) As both lower courts found, therefore, the Municipalities enacted the anti-solicitation ordinances to counter the effect this perception might have on residents' housing choices:

> Indeed counterdefendants' witnesses testified that the anti-solicitation ordinances are based on the desire to protect residents from exposure to advertising because this information might cause homeowners to question the racial stability of their communities or re-evaluate their decisions to live there. As with the "for sale" sign bans, the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities.

(App., pp. 12, 113 (citations omitted).)

This purpose cannot justify a restriction on real estate advertising. As the Sixth Circuit Court of Appeals recently held, this Court's decisions have permitted greater regulation of commercial speech than "pure" speech only when the "governmental interest asserted is either related to regulating the commerce the 'commercial speech' is promoting, or related to any distinctive effects such commercial activity would produce." *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 465 (1991). The Municipalities, however, have no legitimate interest in regulating the private housing decisions that real estate advertising concerns. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 87, 96 (1977) (The First Amendment denies government the power to restrict dissemination of information simply because it may cause residents to move away). Thus the Municipalities' attempt to dismiss

the conflict between this case and *Discovery Network* (Munic. Br., p. 18 n.8) fails. Unlike the Court of Appeals in this case, the *Discovery Network* court properly accorded real estate advertising "a high value" in the relevant First Amendment calculus. 946 F.2d at 471; *see Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980) ("We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Cons. Council*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

Given the high value of speech concerning private housing choice, it is a constitutionally acceptable burden to ask residents simply to throw away one more piece of mail, or hang up on one more caller, to avoid a broad prohibition on such speech. *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72 (1983). Thus the anti-solicitation laws fail to advance the Municipalities' purported, post-hoc interest in privacy because real estate advertising is not a constitutionally significant intrusion on residential privacy. And indeed, if the Municipalities and the Court of Appeals cannot discern the constitutional difference between the picketing of single residence, *Frisby v. Schultz*, 487 U.S. 474 (1988), and a holiday card mailed to everyone in town (*see* Munic. Br., pp. 21-22; App., pp. 42-44), then this Court's intervention is urgently needed.

The Municipalities mischaracterize the significance of residents' participation in the municipal anti-solicitation schemes when they suggest residents thereby demonstrate that real estate speech has "no value." (Munic. Br., p. 17.) First, the Municipalities ignore the chilling effect that the ordinances have on brokers, some of whom have abandoned *all* direct advertising in the Municipalities. (*See* Pet., pp.

7-9.) Second, residents who opt into the anti-solicitation scheme may simply have accepted the Municipalities' anti-broker, integration maintenance rhetoric (Pet., pp. 7-8); these residents nevertheless may be willing sellers, either by owner, through the SSHC, or through other brokers who agree to cooperate with municipal integration maintenance programs. Finally, participants may not realize that the Municipalities will use the ordinances to bar *all* real estate advertising, rather than just advertisements urging them to sell or list their homes; those residents might be willing recipients, for example, of an advertisement informing them that a house near theirs would be available to an interested relative or friend. (*E.g.*, DX 200.)

The ordinances restrain a substantial amount of real estate advertising (all bulk mailing and as much as 25% of individual mailing) and chill even more, while they prevent no constitutionally significant intrusion on residential privacy. Consequently, there is no "reasonable fit" between the burden and the benefit of the ordinances. *See Discovery Network*, 946 F.2d at 471 ("minuscule" benefit fails to justify a ban on 15% of plaintiff's real estate advertising).

B. The Anti-Solicitation Ordinances Are Improper Viewpoint Discrimination.

The ordinances stifle only speech by real estate brokers. The SSHC is free to advertise its integration maintenance philosophy. The local chamber of commerce may urge residents not to move away. Even home improvement companies may urge residents to remodel rather than move. Thus the Municipalities have weighed in to mute one discreet perspective on the issue of housing choice. This viewpoint discrimination is not limited to the simplistic commercial/non-commercial distinction suggested by the Municipalities (Munic. Br., p. 23).

The Municipalities bear a heavy burden to justify this discrimination against brokers' viewpoint. Their attempt

to distinguish *Discovery Network* on the ground that it applies strict scrutiny to a content-based restriction on real estate advertising (Munic. Br., p. 18 n.8) echoes rather than refutes Petitioners' argument.

The Municipalities' reliance on an illusory comparison to *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), fails to meet their burden. The fundamental difference between this case and *Rowan* is illustrated by an example drawn directly from *Rowan*. There the Court noted that a householder may bar delivery of a dry goods catalogue if he feels, in his sole discretion, that it is sexually provocative. *Id.* at 737. A resident of one of the Municipalities who concludes the same catalogue disturbs his privacy—*e.g.*, by tempting family members to overspend a strained domestic budget—could do nothing under the anti-solicitation laws, however. The *Municipalities*, rather than the resident, have decided that only real estate advertising disturbs the resident's privacy enough to warrant restriction.

C. The Municipalities' Response To Petitioners' Equal Protection Claim Rests On A Case That Did Not Involve The Equal Protection Clause.

In *Board of Trustees of State Univ. of N.Y. v. Fox*, "the only . . . issue was the students' claim that their First Amendment rights had been infringed." 492 U.S. 469, 473 (1989). The Court referred to the equal protection rational basis standard only for the purpose of clarifying that the "reasonable fit" standard is more exacting than the former standard. *Id.* at 480. Thus the Municipalities are alone in their surprise that the *Fox* Court did not "even" mention the reference in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345 (1986), to the "crucial distinction" between advertising of casino gambling and advertising of constitutionally protected activities.

The ordinances substantially restrain only Petitioners' constitutionally protected speech. The Municipalities fail

to justify stifling one group of speakers with reference to any interest but an improper desire to manipulate residents' housing choices. The ordinances deny Petitioners equal protection of the law.

D. The Municipalities Rewrite Their Ordinances To Counter Petitioners' Vagueness Challenge.

The ordinances define "solicitation" as a communication "which is intended to induce the sale, rental or listing for sale or rental" of the dwelling to which the communication is directed. (*E.g.*, App. 143.) The Municipalities, however, have distributed an "enforcement policy statement" redefining "solicitation" as "*any* business or promotional communication by a real estate broker to a homeowner in his or her home. . . ." (Munic. Br., p. 7, emphasis added.) Thus an advertisement offering investment properties or refinancing services would offend the "enforcement policy," even though it plainly is outside the definition contained in the ordinances themselves. The vagueness in the ordinance that permits this confusion and unfettered enforcement discretion violates Petitioners' due process rights.

The Municipalities' Brief attempts to bridge the definitional gap between the ordinances and their "enforcement policy" by again redefining "solicitations" as communications "intended to induce business, sooner or later." (Munic. Br., p. 7 n.4.) Because the "business" of real estate brokers involves much more than generating listing (brokers must also *sell* their own inventory and may sell other brokers' listings, for example), this redefinition substantially expands the scope of the ordinances. That the Municipalities found it necessary to stretch their anti-solicitation ordinances even in their Brief in Opposition is a telling admission that the ordinances and the municipal "enforcement policies" are hopelessly vague and unfair.

II. THE "FOR SALE" SIGN ORDINANCES VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS.

The Municipalities' attempt to undermine the District Court's finding that they "regulate the use of 'for sale' signs differently from other signs" (App., pp. 104-106, *see* Munic. Br., pp. 11-12) fails because it simply identifies restrictions common to real estate signs and some other signs, while ignoring the differences on which the court based its finding. *Compare, e.g.*, Munic. App., p. 34 *with id.*, p. 36 ("for sale" and garage sale signs share size restriction under Country Club Hills' ordinances, but only "for sale" signs must be placed within three feet of and parallel to the house).

Like the Court of Appeals, the Municipalities disregard the District Court's findings that the sign restrictions are designed to preserve current integration patterns in the Municipalities. (App., pp. 106-107 (citations omitted).) It is not surprising, therefore, that the Municipalities also fail to respond to Petitioners' argument that the District Court's finding that the sign restrictions are a "reasonable" measure to achieve this purpose (*id.*) rests on an erroneous belief in government's power to restrict speech in pursuit of an improper, non-speech related interest in manipulating residential housing choice. The Municipalities also consequently ignore Petitioners' contention that the lower courts' unquestioning acceptance of "community aesthetics" is improper, given the plain evidence, found by the District Court and undisturbed on appeal, that an "integration maintenance" purpose underlies the sign restrictions. Thus the District Court's findings amply support the conclusion that the Municipalities have done just what *Linmark Assocs.* forbids: they restrict "for sale" signs in order to deny residents housing information that the government disapproves.

III. THE APACHE STREET AFFIRMATIVE MARKETING PLAN VIOLATES THE EQUAL PROTECTION RIGHTS OF BLACK HOMESEEKERS AND BROKERS.

SSHC's Brief confirms the importance of the question raised in this Petition when it acknowledges that "thousands" of other communities have in place "affirmative marketing" programs, and thus will look to this case for guidance. Tellingly, however, SSHC fails to identify *any* other such program that has sought to "maintain integration" at the expense—both in lost opportunity and stigma—of the historic *victims* of racial discrimination. To leave the Court of Appeals' decision in place would risk tempting other communities to stand fair housing principles on their heads by attempting to "manage" their black populations.

The Apache Street Plan differs in a crucial way from plans, such as the NAR's Voluntary Affirmative Marketing Plan, which seek to ensure equal information to whites and minorities. The Apache Street Plan did not seek to redress an information deficit among white buyers; as the majority race, whites have full access to housing and housing information in Park Forest. Instead, the Plan sought to manage the black population on Apache Street in order to counter the "perception" that Apache Street was a "black block." (Pet., p. 12.)

Thus the Plan singles out blacks—and not whites, asians, hispanics or any other racial or ethnic group—as a threat to community health and actively seeks to limit their numbers. Black brokers, like black homeseekers, feel the impact of that stigma. This burden is precisely what this Court warned against in *City of Richmond v. J.A. Croson Co.*:

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions

> of racial inferiority and lead to a politics of racial hostility.

488 U.S. 469, 493 (1989). Even if the Plan had not deliberately diminished black housing opportunity on Apache Street, therefore, it still imposed a constitutionally unacceptable stigmatic burden on the historic victims of housing discrimination.

SSHC does not attempt to deny that its AMP considers only the race of the homeseeker. Instead, Park Forest and SSHC assertedly had a compelling interest in ensuring that they "did not become . . . 'passive participant[s]' in the Chicago area's racially discriminatory dual housing market." (SSHC Br., p. 27.) When a dual housing market arises, however, it does so because whites, who are free to live wherever they choose, choose not to live near blacks. The Apache Street Plan's focus on obtaining white, rather than black, buyers for three specific homes validates white resistance to black entry and fosters the stigmatizing perception that blacks, alone, are a group whose numbers must be managed lest they spoil the community. (*See* DX 437.) Accordingly, Park Forest and the SSHC have failed to demonstrate a compelling governmental interest and the Apache Street AMP cannot survive strict scrutiny.

The SSHC's attempt to wish away former President Bean's testimony that the Apache Street Plan was "one of the things *we felt we had to do*" (Tr., 301 (emphasis added)) is unavailing. The testimony cited by SSHC (SSHC Br., p. 9) simply establishes that SSHC saw to the details and form of the Plan; nothing Bean said contradicts his testimony that Park Forest leaders were intimately involved in conceiving the Plan's substance and viewed it as something for which they were responsible. (*See, e.g.*, Tr. p. 713 (Village "require[d] that the properties when sold be marketed affirmatively").)

SSHC relies principally on a finding that some brokers (who were not necessarily NAR or GSSBR members) steered homeseekers on Apache Street two decades ago to portray Petitioners' interests as diverse from those of black homeseekers. (SSHC Br. at 18.) (SSHC's "evidence" of present steering distorts both the District Court's findings and the law. The court found that brokers simply respond to homeseekers' preferences: "they are followers and not leaders of change in housing patterns." (App., p. 69.) Such a response is not steering. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530 (7th Cir. 1990).) Much more recently, however, the NAR and the Chicago Far-South Suburban Chapter of the National Association for the Advancement of Colored People concurred in their objection to the integration maintenance policies jointly developed by SSHC and the Municipalities. 53 Fed. Reg. 26,318 (1988). Thus the SSHC's implicit suggestion that black homeseekers might actually favor municipal programs designed to "manage" their numbers—in a way the program manages no other ethnic or racial group—is as unsupported by fact as it is by logic. Petitioners will vigorously and fairly represent both their black members and customers in this important case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals should be granted.

Respectfully submitted,

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